(4)

PROCEEDINGS AND ORDERS

DATE: 061985

CASE NBR 84-1-01248 ASX
SHORT TITLE Village Publishing Corp.
VERSUS NC Dept. of Revenue

DOCKETED: Feb 1 1985

Date	Proceedings and Orders
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84-1248 (i)

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

VILLAGE PUBLISHING CORPORATION,
Appellant
v.
NORTH CAROLINA DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the selective taxation of certain newspapers pursuant to the North Carolina Sales and Use Tax Act violate the guarantees of freedom of speech and press in the First Amendment to the United States Constitution?

2. Does the North Carolina Sales and Use Tax Act, which exempts paid circulation newspapers from taxation but denies such an exemption to free circulation newspapers, violate the Fourteenth Amendment guarantee of equal protection of the law?

STATEMENT OF PARTIES

Village Publishing Corporation is the appellant in this action. Village Publishing Corporation is a subsidiary of The Village Companies, and it is affiliated with Village Broadcasting, Inc.; Village Communications, Inc.; Village Radio of Wilmington, Inc.; Villcom Broadcasting, Inc.; Village Sports, Inc.; The Print Shop, Inc.; Village Cable, Inc.; and Village Video Productions, Inc. The State of North Carolina Department of Revenue is the appellee in this action.

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October Term, 1984

VILLAGE PUBLISHING CORPORATION
Appellant,
v.
NORTH CAROLINA DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court
of North Carolina

JURISDICTIONAL STATEMENT

Appellant Village Publishing Corporation, respectfully submits the following jurisdictional statement pursuant to Rule 15 of the Rules of the United States Supreme Court, and prays that the Court require briefs on the merits and oral argument in this proceeding.

OPINIONS BELOW

To date there are no official or unofficial reports of the opinions delivered by the Courts below in this case. The decision of the North Carolina Supreme Court, from which this appeal is taken, will be reported in the North Carolina Reports and in the South Eastern Reporter. A copy of the opinions of the Supreme Court of North Carolina, the North Carolina Court of Appeals, the Superior Court of Wake County, North Carolina, the North Carolina Tax Review Board, and the Decision of the Secretary of Revenue are included in the Appendices.

STATEMENT OF JURISDICTION

This is an appeal pursuant to 28 U.S.C. § 1257(2) taken from a decision of the Supreme Court of North Carolina. The opinion and judgment of the Supreme Court of North Carolina was entered on November 6, 1984. The Notice of Appeal was filed in the North Carolina Supreme Court on January 29, 1985. The statutory provision which confers jurisdiction on this Court is 28 U.S.C. § 1257(2). Appellant believes that the following cases sustain the jurisdiction of this Court over this appeal:

> Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365 (1983) (state use tax assessed against publications held to violate First Amendment);
>
> Hartford Steam Boiler Inspection and Insurance Company v. Harrison, 301 U.S. 459 (1937) (state statute discriminating against certain insurance companies violated Fourteenth Amendment).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C. Gen. Stat. § 105-164.13:

> Retail sales and use tax. - The sale at retail, the use, storage or consumption in this State of the following tangible personal property is

specifically exempted from the tax imposed by this Article:

* * *

(28) Sales of newspapers by resident newspaper street vendors and by newsboys making house-to-house deliveries and sales of magazines by resident magazine vendors making house-to-house sales.

* * * *

STATEMENT OF THE CASE

Appellant, Village Publishing Corporation, is a North Carolina corporation with its principal place of business in Chapel Hill, North Carolina. Appellant publishes The Village Advocate (hereinafter "The Advocate"), a weekly community newspaper which is distributed free of charge to the public in the vicinity of Chapel Hill, North Carolina. The Advocate contains commercial and classified advertising together with some news and sports articles and announcements of local public interest, including community events calendars, sporting events schedules, school lunch menus and the like. The Advocate's current circulation is approximately 24,000 copies, of which about 97 percent are delivered house-to-house by newsboys and the remainder are distributed from

newspaper racks located at various points throughout the service area.

During the period from April 1, 1972 through March 31, 1978, The Advocate was printed by Womack Press in Danville, Virginia. Appellant did not remit any use taxes to the North Carolina Department of Revenue for printing services rendered during the period in question.

The North Carolina Sales and Use Tax Act (hereinafter "the statute"), N.C. Gen. Stat. §§ 105-164.4 and 105-164.6, generally applies to all business entities, with certain stated exemptions. Among these exemptions is section 105-164.13(28) (hereinafter "the exemption"), which exempts from taxation those newspapers which are sold through street vendors or by newsboys making house-to-house deliveries. Although The Advocate, like its competitors which are sold,

is distributed through street vendors and by newsboys making house-to-house deliveries, The Advocate is not exempt from taxation under the statute solely because it is distributed free of charge. Thus, through the selective use of exemptions, the North Carolina legis-lature has created a tax scheme that has the appearance of being uniform, but actually treats the press much differently than other businesses because all but a select minority of newspapers are largely exempted from sales and use taxation.

On June 12, 1978, the North Carolina Department of Revenue issued notices of proposed assessment of additional North Carolina and Orange County use taxes against appellant, together with penalties and interest, in the total amount of $42,309.89, based upon sums paid by appellant to Womack Press for printing

The Advocate during the period from April 1, 1972 through March 31, 1978. Appellant protested the proposed assessment on several grounds, including constitutional grounds. Appellant contended that the exemption of purchases of newsprint, ink and printing services by paid circulation newspapers from sales and use taxation by N.C. Gen. Stat. § 105-164.13(28), and the denial of this exemption to The Advocate, violated the guarantees of freedom of speech and of the press in the First Amendment and the guarantee of equal protection of the laws in the Fourteenth Amendment.

On November 11, 1980, following a tax hearing on appellant's protest, the Secretary of Revenue sustained the proposed assessment of use taxes, stating that he had no authority to rule on appellant's constitutional objections. See Appendix E. On June 12, 1981,

following a hearing, the Tax Review Board entered Administrative Decision No. 181 affirming the decision of the Secretary of Revenue. See Appendix D. On August 21, 1981, appellant paid the taxes and interest asserted to be due.

On July 20, 1982, the Superior Court affirmed the decision of the Tax Review Board and ruled that the North Carolina Sales and Use Tax Act did not violate the Constitution. See Appendix C. Appellant timely appealed to the North Carolina Court of Appeals. On February 7, 1984, the Court of Appeals affirmed the decision of the Superior Court. On November 6, 1984, the Supreme Court of North Carolina modified and affirmed the decision of the North Carolina Court of Appeals, holding that the selective application of the use tax to The Advocate did not violate the Free Speech Clause or the Free Press Clause of the

First Amendment of the United States Constitution and did not violate the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF SUBSTANTIALITY OF FEDERAL QUESTION

This appeal presents two important and substantial federal questions. The Supreme Court of North Carolina reached both of these federal questions in upholding the North Carolina Sales and Use Tax Act (the "statute") and denying the federal rights asserted. First, appellant contends that the statute violates the guarantees of freedom of speech and freedom of press contained in the First Amendment to the United States Constitution by imposing a sales and use tax primarily upon a small number of free circulation newspapers, and largely exempting other newspapers. Second, appellant claims that the statute violates the guarantee of equal protection of the laws contained in the Fourteenth Amendment of the United States

Constitution because it largely exempts paid circulation newspapers from sales and use tax, while imposing such taxes on free circulation newspapers.

The questions presented are important and substantial because the taxation of the press inherently has great potential to restrain First Amendment freedoms, even where no such restraint is intended. This Court has emphasized the importance and delicacy of these freedoms by striking down tax statutes that have the effect of unduly curtailing the freedom of speech or freedom of press. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365 (1983) (use tax that applied only to a small group of large newspapers was unconstitutional); Speiser v. Randall, 357 U.S. 513 (1958) (denial of tax exemption based on refusal to sign oath was unconstitutional);

Murdock v. Pennsylvania, 319 U.S. 105 (1942) (license tax on distribution of handbills violated freedoms of speech, press and religion); Grosjean v. American Press Co., 297 U.S. 233 (1935) (license tax on large newspapers was held unconstitutional). When First Amendment freedoms are at stake, "the constitutional tolerance for error diminishes drastically." Minneapolis Star, 103 S.Ct. at 1374 n.12. The issues in this case are important because they concern a state's ability to burden certain types of newspapers with a competitive disadvantage under the guise of a scheme of general taxation.

I. THE DECISION BELOW, UPHOLDING THE SELECTIVE TAXATION OF NEWSPAPERS, IS INCONSISTENT WITH FIRST AMENDMENT PRINCIPLES ESTABLISHED BY THIS COURT

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law ...

abridging the freedom of speech, or of the press ...." The First Amendment applies to the states through the due process clause of the Fourteenth Amendment. See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 749 n.1 (1976). "A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." Minneapolis Star, 103 S.Ct. at 1376. Unless the State has a compelling interest that counterbalances the burdens on interests protected by the First Amendment, such a tax violates the First Amendment.[1]

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[1] Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 103 S.Ct. 1365, 1372 (1983).

It should not matter that a large portion of The Advocate consists of material that might be labeled as commer-

Although states have broad authority to levy taxes, speech can be effectively

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cial speech. Although a state can permissibly regulate commercial speech as to the time, place, and manner of expression, and although a state can permissibly restrict commercial speech that is false, misleading or deceptive, Friedman v. Rogers, 440 U.S. 1, 9 (1979) absent a significant governmental interest truthful commercial speech is entitled to First Amendment protection. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 776-81 (1976) (Stewart, J., concurring). If commercial speech is neither misleading nor related to unlawful activity, a state must assert a substantial interest to justify burdening such speech. Central Hudson Gas & Electric Company v. Public Service Commission of New York, 447 U.S. 557, 564 (1980). North Carolina has never contended that the content of The Advocate is false, misleading, or unlawful and it has never claimed that there is a substantial interest or a significant governmental interest in taxing certain newspapers differently than others. Furthermore, The Advocate consists of traditional non-commercial speech as well as commercial speech. Therefore, the First Amendment guarantees of free speech and free press should outweigh the State's interest in the selective application of a burdensome tax on the press.

The Advocate should not be burdened with a competitive disadvantage by the

limited by the misuse of taxing authority. See Grosjean v. American Press

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tax laws as a result of the commercial content of the newspaper. As the Court previously has noted, the consumer's interest in the receipt of commercial information may be even keener than his interest in the day's political developments. Virginia Pharmacy 425 U.S. at 763. As the Court there stated:

> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest.
>
> * * *
>
> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 764-65 (citations omitted). Thus, The Village Advocate's First Amendment rights should not be ignored due to the commercial aspects of the newspaper, but rather a tax scheme that

Co., 297 U.S. at 250. The application of a general sales and use tax to the press is permissible only if the tax does not place special burdens on any aspect of the press. See Minneapolis Star, 103 S.Ct. at 1369-70, 1371. In this case the State has misused its taxing authority.

This case is similar to the case of Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365 (1983), which held that a use tax that placed special burdens on a few large newspapers violated the First Amendment. This case is arguably more offensive to the First Amendment, however, because it places special burdens on a few small free circulation newspapers. Free circulation newspapers like The Advocate necessarily derive almost all of their revenues from

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places a competitive disadvantage on a newspaper as a result of its commercial content should demand First Amendment scrutiny.

advertising, and therefore have a higher commercial content than their traditional paid circulation newspapers. Thus, the North Carolina sales and use tax scheme is particularly offensive in its treatment of the press because it effectively discriminates between newspapers on the basis of their content.

Taxes that burden some types of newspapers differently than others could be used as a tool to censor the content of newspapers, and such taxes present the threat of censorship. See 103 S.Ct. at 1374. In Minneapolis Star, the Court noted that the threat of censorship may deter the exercise of First Amendment rights almost as potently as the application of sanctions. Id. In this case there is the potential for the legislature to utilize tax exemptions from the general sales and use tax to encourage traditional paid circulation newspapers

and discourage free circulation newspapers merely because the free circulation newspapers do not fit the legislators' notions of how a newspaper should look or what it should contain.

The use of tax exemptions to inhibit First Amendment freedoms is not without precedent. This Court has made it clear that the selective enactment of tax exemptions can impermissibly infringe upon First Amendment freedoms. See Speiser v. Randall, 357 U.S. 513 (1958). Thus, although the tax imposed on The Advocate purports to be part of a general scheme of taxation, North Carolina should not be permitted to impose relative tax burdens on free circulation newspapers through the selective enactment of tax exemptions for traditional paid circulation newspapers.

Because First Amendment rights are at stake in this action, the Supreme

Court of North Carolina should have examined whether the State has a compelling interest that counterbalances the burden imposed on the First Amendment freedoms of free circulation newspapers. The Supreme Court of North Carolina should have inquired whether the purposes served by the exemption of paid circulation newspapers are legitimate, whether the exemption is the least intrusive means of achieving those purposes, and whether, on balance, the State has a compelling interest that outweighs the burden placed on appellant's First Amendment freedoms. See NAACP v. Button, 371 U.S. 415, 438-39 (1963); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960). The Supreme Court of North Carolina did not attempt to balance these considerations, and had it done so it would have been forced to strike down North Carolina General Statutes section 105-164.13(28)

in favor of the appellant's First Amendment freedoms.

II. THE DECISION BELOW, UPHOLDING THE CONSTITUTIONALITY OF LEGISLATIVE CLASSIFICATIONS WHICH SELECTIVELY TAX CERTAIN NEWSPAPERS, IS INCONSISTENT WITH THE FOURTEENTH AMENDMENT GUARANTEE OF EQUAL PROTECTION OF THE LAWS AS INTERPRETED BY THIS COURT.

The decision of the North Carolina Supreme Court conflicts with long-established precedents of this Court upholding the Fourteenth Amendment guarantee of equal protection of the laws. Under traditional equal protection analysis, heightened judicial scrutiny of a legislative classification is required when the classification impermissibly burdens the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); Massachusetts Board of Retirement

v. Murgia, 427 U.S. 307 (1976). In an apparent conflict with this line of precedent, the North Carolina Supreme Court applied the rational basis test to conclude that the North Carolina Sales and Use Tax Act did not offend the Fourteenth Amendment guarantee of equal protection of the laws, despite the statute's differential treatment of publications within the press by selectively exempting all but a small minority of newspapers from the burden of a generally applicable tax. The decision of the Supreme Court of North Carolina raises a substantial federal question of whether the denial of tax exemptions to free circulation newspapers offends the Fourteenth Amendment guarantee of equal protection of the laws.

It has long been settled that, for the purposes of equal protection analysis, First Amendment rights are funda-

mental rights and their selective infringement by legislative classifications gives rise to heightened judicial scrutiny. Williams v. Rhodes, 393 U.S. 23 (1966).[2] In the absence of a compelling government interest, the freedoms of speech and press cannot be burdened for a select minority without offending the constitutionally-mandated norm of equality of treatment in the exercise of fundamental First Amendment rights. L. Tribe, American Constitutional Law § 16-1, (1978).

It should be clear that any tax which burdens only a small group of newspapers is suspicious. See Grosjean v. American Press Co., 297 U.S. 233, 251 (1936); Minneapolis Star, 103 S.Ct. at 1376 (White, J., concurring). By exempt-

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[2] See supra note 1.

ing certain sales of paid circulation newspapers from a tax generally applicable to most business enterprises, and at the same time denying the exemption to free circulation newspapers, the State has erected a system of classifications which violates the norm of equality of treatment in the exercise of First Amendment freedoms. The economic result of such a classification is to place free circulation newspapers at a governmentally-created competitive disadvantage within the marketplace for commercial advertising.

In Speiser v. Randall, 357 U.S. 513 (1958), this Court determined that the discriminatory denial of tax exemptions can be the source of impermissible infringement of First Amendment rights. The system of selective exemptions in the statute is at least as offensive to the Constitution as that encountered in

Speiser. If the State can single out certain types of newspapers by their method of distribution and penalize them by withholding an exemption from taxation granted to other newspapers, then the State is able to decide how newspapers should be marketed and what percentage of their pages shall be devoted to news and commentary. Minneapolis Star, 103 S.Ct. at 1374.

In its decision below, the Supreme Court of North Carolina concluded that the North Carolina Sales and Use Tax Act does not violate the Fourteenth Amendment guarantee of equal protection of the laws because it found a rational basis for the statutory classifications. That court eschewed the use of heightened judicial scrutiny because it considered its analysis of the First Amendment issues to foreclose any argument that the statute impermissibly infringes upon the exercise

of a fundamental right. The Supreme Court of North Carolina did not properly analyze whether appellant's First Amendment rights had been infringed, and instead it disposed of appellant's First Amendment challenge to the statute simply by distinguishing this Court's decision in Minneapolis Star.

The North Carolina Supreme Court never considered whether a system of statutory classifications which exempts certain publications within the press from the general scheme of taxation, while taxing other publications, impermissibly infringes upon the fundamental rights guaranteed by the First Amendment. As a result of its failure to reach this issue, the North Carolina Supreme Court erroneously concluded that the rational basis test was the appropriate litmus to determine whether the statute violates the guarantee of equal

protection of the laws. The North Carolina Supreme Court's decision is thus inconsistent with the equal protection analysis established by this Court. San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

Had the Supreme Court of North Carolina properly exercised heightened judicial scrutiny to appraise the constitutional validity of the North Carolina Sales and Use Tax Act, it would have found that the State lacks any compelling justification for its discriminatory allocation of the tax burden among certain publications within the press. Indeed, even to apply the rational basis test, the North Carolina Supreme Court was forced to speculate as to the reasons

for the statutory classifications.[3] The North Carolina Supreme Court never considered whether the interests of The Advocate and other freely distributed newspapers in being taxed on an equal footing with other members of the press outweighs whatever administrative difficulties there may be in collecting taxes through street vendors and newsboys. Even if this supposed administrative hardship can be raised to the level of a compelling government interest, the Statute would still violate the Equal Protection Clause, for the exemption does

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[3] The North Carolina Supreme Court stated that "the legislature could have concluded that these sales would likely be made, for the most part, by minors acting as independent merchants . . . [and that] requiring the sales tax to be paid on these transactions would place a great burden on the vendor whose age and lack of business exp. ience would render it difficult to comply with [the procedures] required by the Act." Infra at A-29 (emphasis added).

not seek to promote this interest by the least intrusive means. If the State would simply broaden the exemption, it could avoid any administrative difficulties which it might encounter in collecting taxes from newsboys and street vendors without placing free circulation newspapers at a competitive disadvantage. The State should not be heard to protest that such an alternative would cost the State the use taxes which it currently receives from free circulation newspapers, because sustaining government revenues has never been a sufficient reason to violate constitutional guarantees. Minneapolis Star, 103 S.Ct. at 1372.

CONCLUSION

For the foregoing reasons, this case presents important and substantial

federal questions as to whether the North Carolina Sales and Use Tax Act violates appellant's constitutional rights. The questions posed in this case concern whether a state can selectively burden certain types of nontraditional newspapers under the guise of a general system of taxation. The danger of such a tax is that it has the potential to be used to censor the press through the selective enactment of exemptions. Appellant requests that this Court require briefs and oral arguments on the merits, or in the alternative that this Court summarily reverse the decision of the Supreme Court of North Carolina.

Respectfully submitted.

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

In the Matter of the Assessment of Additional North Carolina and Orange County Use Taxes Against VILLAGE PUBLISHING CORPORATION for the Period from April 1, 1972 through March 31, 1978	)	No. 127PA84

On discretionary review, pursuant to N.C.G.S 7A-31(1), of the decision of the Court of Appeals, 66 N.C. App. 423, 311 S.E.2d 366 (1984), affirming judgment for appellee, North Carolina Department of Revenue, by Farmer, J., on 20 July 1982 in Wake County Superior Court which judgment affirmed decisions of the North Carolina Secretary of Revenue and Tax Review Board also in favor of appellee.

Thigpen & Hines, P.A., by JAMES C. SMITH for petitioner appellant.

Rufus L. Edmisten, Attorney General, by GEORGE W. BOYLAN, Assistant Attorney General, for respondent appellee.

EXUM, Justice.

The issue presented by this case is whether the imposition of a use tax under the North Carolina Sales and Use Tax Act, N.C.G.S. 105-164.1 et seq., (the Act) upon copies of a publication printed by Womack Press in Virginia from layouts submitted by appellant, Village Publishing Corporation, a North Carolina corporation, and sold by Womack to appellant for free distribution in North Carolina violates any of appellant's federal or state constitutional rights. We conclude that it does not for reasons which in part differ from those used by the Court of Appeals. Therefore we modify and affirm.

I.

Appellant Village Publishing Corporation is engaged in the publishing and distribution of The Village Advocate (the Advocate), a weekly publication consisting primarily of commercial and

classified advertisements. The Advocate also contains a limited number of other items, including school lunch menus, sporting events schedules, community events calendars and announcements of local public interest. The publication's current circulation rate is approximately 24,000 copies, all of which are distributed free in the Chapel Hill-Carrboro area. Roughly 97 percent of these copies are delivered door-to-door by agents of the corporation with the remainder being distributed from racks scattered throughout the two cities.

During the period from 1 April 1972 through 31 March 1978, the Advocate was not printed by appellant. Rather, appellant provided layouts for the publication to Womack Press in Danville, Virginia, which printed the papers and then sold the finished product to appellant. During this period, appellant did

not pay any sales or use tax on the purchase of this product from Womack Press, either in Virginia or in North Carolina.

On 12 June 1978, an auditor from the North Carolina Department of Revenue completed an examination of appellant's tax records for this period and concluded that appellant owed an additional tax, including penalty and interest, of $42,309.89 based on its transactions with Womack Press. Appellant objected to this proposed assessment to the Secretary of the Department of Revenue (the Secretary). Appellant contended: (1) the Advocate was a newspaper; (2) purchases of newsprint, ink and printing services by paid circulation newspapers were exempt from sales and use taxation by N.C.G.S. 105-164.13(28); and (3) that denial of a similar exemption to the Advocate, a free circulation publication,

violated constitutional guarantees of freedom of speech and press, equal protection of the laws under the United States Constitution and the principle of equitable taxation under Article V, section 2 of the North Carolina Constitution.

Following an 11 November 1980 hearing, the Secretary issued a decision upholding the additional tax assessment. The Secretary concluded: (1) The Advocate is not a newspaper within the meaning of the statute but is an "advertising circular." (2) No statutory authority exists for exempting advertising circulars from taxation. (3) even if the Advocate were a newspaper, it would not escape taxation since the statute exempts only paid circulation and not free circulation publications. (4) The Secretary has no authority to decide appellant's constitutional objections.

Appellant then sought administrative review of this ruling from the North Carolina Tax Review Board (the Board) pursuant to N.C.G.S. 105-241.2. The Board on 2 June 1981 adopted the conclusions of the Secretary and affirmed his decision. Appellant paid the tax on 21 August 1981 and petitioned for judicial review in Wake County Superior Court pursuant to N.C.G.S. 150A-43, again asserting its constitutional objections to the tax. Following a hearing on 20 July 1982, Judge Farmer entered judgment affirming the decision of the Board.

On appeal the North Carolina Court of Appeals concluded: (1) the Advocate is not a newspaper and (2) appellant's First Amendment rights are not violated by a tax which is applicable to all persons who use, consume, distribute or store for use or consumption tangible personal property in this state.

II.

We begin with an examination of the Act before addressing the parties' contentions about it.

Generally the Act, with certain exceptions and in pertinent part, imposes upon persons engaged in the business of selling tangible personal property at retail in this state a state sales tax at a rate of three percent of the sales price of each item sold. N.C.G.S. 105-164.4. The Act also imposes a complementary state use tax "upon the storage, use or consumption in this state of tangible personal property purchased within and without this state for storage, use or consumption within this state" at a rate of three percent of the cost of such property "when the same is not sold but used, consumed, distributed

or stored for use or consumption in this State . . . . " N.C.G.S. 105-164.6.[1]

The purpose of North Carolina's sales and use tax is twofold. The primary purpose is, of course, to generate revenue for the state. N.C.G.S. 105-164.2. The sales tax is, in effect, a tax imposed upon the retail merchant as a privilege tax for the right to engage in that business. Piedmont Canteen Service, Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962). The tax is, however, designed to be passed on to the consumer. N.C.G.S. 105-164.7; Manufacturing Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

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[1] Parallel sales and use tax provisions appear in the Local Government Sales and Use Tax Act, N.C.G.S. 105-463, et seq. Since the same principles apply to both acts, we shall limit our discussion to the North Carolina Sales and Use Tax Act.

The second purpose of the sales and use tax scheme is to equalize the tax burden on all state residents. This is achieved through imposition of the use tax in certain situations where the sales tax is not applicable. The sales tax cannot constitutionally be imposed upon interstate sales since it would then be a tax upon the privilege of doing interstate business, and would constitute a burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966). Imposing a tax upon the retail sale of goods within the state without imposing a complementing tax on the in-state use of goods purchased outside the state might encourage North Carolina residents to shop in other states to avoid paying North Carolina sales tax. Therefore, the

Act imposes a use tax on items purchased outside the state and thus not subject to sales tax, which are brought into the state for "storage, use or consumption" here. "Its chief function is to prevent the evasion of a sales tax by persons purchasing tangible personal property outside of North Carolina for storage, use or consumption within the state." Johnston v. Gill, 224 N.C. 638, 643-44, 32 S.E.2d 30, 33 (1944).

The use tax also removes, "insofar as possible, the discrimination against local merchants resulting from the imposition of a sales tax" and equalizes "the burden of the tax on property sold locally and that purchased without the state." Watson Industries v. Shaw, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952). Unlike a sales tax imposed on interstate sales, the use tax does not impermissibly burden interstate commerce since it is a

tax imposed on the enjoyment of goods after the sale has already spent its interstate character. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966). It is designed to complement the sales tax and to reach transactions which cannot constitutionally be subject to a sales tax. Id. The sales tax and the use tax may often bring about the same result but "they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events." Id at 675, 268 S.E.2d at 576.

Finally, the Act provides for a number of exemptions from sales and use taxes. N.C.G.S. 105-164.13. One of these exemptions is:

> Sales of newspapers by resident newspaper street vendors and by newsboys making house-to-house deliveries and sales of magazines

by resident magazine vendors making house-to-house sales.

N.C.G.S. 105-164.13(28).

III.

Appellant's first assignment of error concerns whether the Advocate is a "newspaper" within the meaning of the exemption created by N.C.G.S. 105-164.13(28). In the courts below, both parties argued the merits of labeling this publication a newspaper for purposes of applying the Act. Appellant contends the Court of Appeals erred in affirming decisions of the Secretary, the Board and Wake County Superior Court that the Advocate does not qualify as a newspaper within the meaning of the exemption. Courts in other jurisdictions which have considered whether publications consisting predominantly of advertisements are "newspapers" have reached

conflicting results. See, Shoppers Guide Publishing Co., Inc. v. Woods, 547 S.W.2d 561 (Tenn. 1977) (advertising circular which is given away is not a newspaper within the commonly understood meaning of the word); Green v. Home News Publishing Co., 90 So.2d 295 (Fla. 1956) (give-away advertising circular with a modicum of local news does not amount to a newspaper). Cf. Hadwen v. Department of Taxes, 139 Vt. 37, 422 A.2d 255 (1980) (advertising circular with only 2-3 percent of its space committed to current events and opinion does constitute a newspaper).

We find it unnecessary to address this issue. We assume, arguendo, that the Advocate is a newspaper within the meaning of the exemption as argued by appellant. See, Hadwen v. Department of Taxes, supra (declining to adopt a definition of newspaper based on con-

tent). We turn now to appellant's other assignments of error.

IV.

Appellant contends that application of the use tax to the Advocate violates the Free Speech and Free Press clauses of the First Amendment to the United States Constitution. In support of this contention appellant refers us to the constitutional principles that a state may not unduly burden freedom of speech or of the press through taxation or other regulatory measures. Appellant reminds us that the power to tax the press is the power to control or suppress it, Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943), and that taxes which unduly curtail freedom of speech or of the press have been held unconstitutional by the United States Supreme Court. Grosjean v. American Press Co., 297 U.S. 233 (1936).

However, these maxims of constitutional law do not alone resolve the issue before us. The United States Supreme Court has made clear in a long line of cases that not all economic regulatory schemes which involve the press implicate First Amendment guarantees. See, Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969); Lorain Journal Co. v. United States, 342 U.S. 143, 155-156 (1951); Branzberg v. Hayes, 408 U.S. 665 (1972).

In Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365 (1983), the United States Supreme Court held a Minnesota use tax which applied to "publications" to be a constitutionally impermissible burden on the press. Although appellant relies heavily on this holding, it does not control the case at bar for three reasons. First, the taxing

scheme challenged there was not the same as ours. Second, the Court did not promulgate a per se rule against all taxes which affect the press. Finally, the Court did undertake a general analysis of economic regulations applicable to the press which resolves appellant's complaint regarding the use tax against appellant's position.

The statute at issue in Minneapolis Star imposed a general sales tax on the sale of goods above a certain minimum price and a use tax on the "privilege of using, storing or consuming in Minnesota tangible personal property" which was not specifically exempt by statute and on which no sales tax was paid. Id. at 577. As the Court noted, this was a classic use tax designed to complement and protect the sales tax by eliminating a resident's incentive to travel to states with lower sales tax and purchase goods

there rather than in Minnesota. Id. Such taxes, in essence, require a resident who shops out of state to pay a "use tax" equal to the sales tax savings. Id. at 582. The Minnesota statute provided an exemption from the sales tax for periodic publications, which appellant, the Minneapolis Star & Tribune Company, had enjoyed from 1967 to 1971.

In 1971 the Minnesota legislature amended the statute to impose a special use tax on the costs of ink and paper used in producing periodic publications, while leaving intact the publications' exemption from sales tax. The amendment created the only situation in the entire tax scheme where components of goods that were later to be sold at retail were taxed. In all other situations, tax was assessed only when the finished product was purchased by the ultimate user. The only components taxed were ink and paper

used in periodic publications. The tax, therefore, fell exclusively upon the press. In addition, the statute was again amended, this time to exempt from the use tax the first $100,000 worth of ink and paper used in any calendar year by a publication so that, in effect, only a few publishers in the state were subject to use taxation.

These unique features of the Minnesota use tax scheme, not the mere fact that the press was being taxed, led the United States Supreme Court to declare this statute unconstitutional. Nonetheless, the Court stressed that "it is beyond dispute that the states and the federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems." Minneapolis Star at 581. The Court noted that "any tax that the press must pay, of course, imposes some burden.

But, as we have observed [citations omitted] this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasize the general applicability of the challenged regulation to all businesses." Id. at 583.

The Minnesota statute failed because it singled out the press for differential tax treatment. The only supporting rationale was the need for revenue--a need which the Court noted was better served by taxing all businesses equally. The Minnesota statute did not serve to complement the state's sales tax, as do most use tax statutes, since it imposed a use tax on publications which were specifically exempt by statute from the state's sales tax. The Court noted that had the tax been a generally applicable sales tax it would probably have been

constitutionally permissible. Id. at 586-87 n.9.

Turning now to the Act at bar, we believe it clear that under the constitutional directives in Minneapolis Star, the North Carolina use tax can be constitutionally assessed against the Advocate even if we assume, as we do, that it is a newspaper which enjoys First Amendment protection. The Act imposes a tax on the "storage, use or consumption in this state of tangible personal property purchased within and without this State for storage, use or consumption in this State." N.C.G.S. 105-164.6. This language clearly demonstrates that the use tax is "an economic regulation generally applicable to all businesses," and not just the press. Unlike the Minnesota statute, the North Carolina statute does not single out the press for disparate tax treatment. Moreover,

unlike the Minnesota tax, the North Carolina use tax applies only to items which, were they sold, would be subject to the sales tax, thus serving to complement the sales tax.

The earlier cases cited in Minneapolis Star, as interpreted in that case, establish that a state has the power to enact statutes which impose taxes on all businesses, including the press, in order to generate revenue so long as those statutes operate evenhandedly upon all similarly situated. The Act at bar imposes a uniform tax on all. Absent the kind of discriminatory tax burden evident in Minneapolis Star, appellant cannot be heard to complain that it, like all other businesses in the state, must bear its portion of the state's revenue needs.

V.

Appellant's final contention is that the Act violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the principle of equitable taxation found in Article V, section 2 of the North Carolina Constitution. The basis for appellant's equal protection claim is the Act's exemption for certain sales of newspapers provided in section 105-164.13(28).[2] Appellant argues that the Act discriminatorily classifies free circulation newspapers, like the Advocate, differently than paid circulation newspapers, by imposing a use tax upon the purchase of printing services and supplies by free circulation newspapers while specifically exempting from the tax

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[2] The exemption is quoted in full, supra, in text.

similar purchases by paid circulation newspapers. Appellant contends that no rational basis exists for this differential treatment and that the Act is therefore unconstitutional.

Appellant misconceives the Act's classification and the effect of the exemption. First, the tax at issue here is not a tax upon the "purchase of printing services and supplies" as appellant contends. The decisions of both the Secretary and the Board demonstrate that appellant's tax assessment was based on the cost (which would include the printer's profit) of the finished printed product appellant purchased from Womack Press, as the statute required. N.C.G.S. 105-164.6 imposes a use tax at the rate of "three percent (3%) of the cost price . . . of tangible personal property when the same is not sold but used, consumed,

distributed or stored for use or consumption in this State." (Emphasis added.)

Second, the Act through the exemption does not, as appellant contends, classify newspapers according to whether they are paid circulation or free circulation, imposing a tax on one while exempting the other. In fact, a newspaper does not qualify for this exemption, nor fail to qualify for it, solely by virtue of whether it is sold or given away. Instead, to qualify for the exemption a newspaper must be sold "by resident newspaper street vendors" or "by newsboys making house-to-house deliveries." The Act classifies not solely on the basis of paid-versus-free circulation, as appellant contends, but also on the basis of the method of distribution. Even paid circulation newspapers are subject to the sales tax on all sales other than those by newsboys selling

door-to-door or sales by resident street vendors. The distinction in the Act is between the sale of newspapers door-to-door by newsboys or by resident street vendors on the one hand and the distribution of newspapers by any other method on the other, whether the newspapers are sold or given away.

The question is whether this classification is constitutional. The answer depends on whether the legislature's decision to exempt from sales and use taxation the sale of newspapers door-to-door by newsboys or by street vendors, while subjecting all other newspapers distributed by other means to either the sales or use tax, bears a rational relationship to some legitimate governmental interest. We conclude that it does.

In determining whether a challenged statute violates the Equal Protection

Clause of the federal constitution by treating similarly situated persons differently, courts generally employ a two-tiered analysis. Texfi Industries v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980). Under this analysis, a statute is subjected to the highest level of review, or "strict scrutiny," "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." White v. Pate, 308 N.C. 759, 766 304 S.E.2d 199, 204 (1983), citing Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16 (1973). For a statute to survive this level of constitutional review, the government must demonstrate that the classification created by the statute is "necessary to

promote a compelling government interest." Id.; Texfi Industries v. City of Fayetteville, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980).

Where a statutory classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the government need only show the classification in the challenged statute has some rational basis. White v. Pate, 308 N.C. at 766-67, 304 S.E.2d at 204, citing, Vance v. Bradley, 440 U.S. 93 (1979). A statutory classification survives this analysis if it bears "some rational relationship to a conceivable legitimate interest of government." Id. Statutes subjected to this level of scrutiny come before the Court with a presumption of validity. Id.

We conclude that the proper level of review in this case is the lower level,

or rational basis standard. The Act is clearly a taxing statute which operates evenly against all persons who purchase tangible personal property within North Carolina or purchase it without North Carolina for "storage, use or consumption in this State." As such, the statute does not operate to the peculiar disadvantage of a suspect class. And, as we concluded earlier in dealing with appellant's First Amendment claim, neither does it impermissibly burden the exercise of a fundamental right.

The Act is designed to produce revenue for the state while, at the same time, equalizing the tax burden by insuring that out-of-state purchases are taxed at the same rate as local sales. Watson Industries v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952). The Act is an economic regulation. In determining whether a purely economic regulation

violates the Equal Protection Clause, the test generally applied is the rational basis standard. See, Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). Indeed, appellant seems to recognize that this is the proper level of review in its argument that the classification created by G.S. 105-164.13(28) rests upon "no rational basis." Appellant's Brief p. 16.

Having concluded that the rational basis standard is the proper level of review in this case, we turn now to the question of whether the Act's classification "bears a rational relationship to a conceivable legitimate purpose." White v. Pate, 308 N.C. at 766-67, 304 S.E.2d at 204.

The Equal Protection Clause is not violated merely because a statute classifies persons differently, so long as there is a reasonable basis for the

distinction. Lamb v. Wedgewood, 308 N.C. 419, 435, 302 S.E.2d 868, 877 (1983). "A court may not substitute its judgment of what is reasonable for that of the legislative body, particularly where the reasonableness of a particular classification is fairly debatable." Id., citing ASP Associates v. The City of Raleigh, 298 N.C. 207, 226, 258 S.E.2d 444, 456 (1979).

In creating the sales and use tax exemption for newspaper sales door-to-door by newsboys or by street vendors, the legislature could have concluded that these sales would likely be made, for the most part, by minors acting as independent merchants. See, Hadwen v. Department of Taxes, 139 Vt. 37, 422 A.2d 255 (1980). As such, requiring the sales tax to be paid on these transactions would place a great burden both on the vendors, whose age and lack of business experience

would render it difficult to comply with the monthly reporting procedures required by the Act, and the Department of Revenue, which would be charged with policing these sales and enforcing payment of the tax. The legislature, therefore, could have reasonably concluded that the state's interest in generating revenue was better served by a system which exempted these particular sales than one which included them.

The Advocate also distributes its newspapers through door-to-door vendors, just as do paid circulation newspapers. The Advocate's vendors, however, are not independent contractors making retail sales as are vendors of paid circulation newspaper. Rather, they are agents of the Advocate, distributing a free product. As such, there is no retail sale involved and the concern that the youth and lack of business experience of minors

acting as independent contractors will render the monthly reporting requirements of the Act too burdensome for both the state and the vendors is not present. Where no sale is involved, no reports for tax purposes are required. The rationale which justifies exempting retail sales by resident street vendors and newsboys selling door-to-door does not apply to the Advocate. Appellant is not taxed, as it contends, simply because it is free. It is taxed because its distribution method does not involve retail sales by the narrowly defined group of vendors described by the Act. In that sense, the Advocate is treated no differently than a paid circulation newspaper which distributes its product in any manner other than resident street vendors or newsboys selling door-to-door. The legislature has chosen to exempt from the tax two particular types of retail newspaper

sales. The Advocate fails to qualify for the exemption for the reason that it has no retail sales. A paid circulation newspaper would similarly fail to qualify for the sales and use tax exemption to the extent that the newspaper is sold at retail by means other than resident street vendors or door-to-door newsboys. A sales tax would be levied on these other kinds of retail sales.

We hold, therefore, that the classification created by the Act rests upon a rational basis and is therefore not in violation of the Equal Protection Clause.

Appellant also contends that the classification violates Article V, section 2 of the North Carolina Constitution which provides in pertinent part that "the power of taxation shall be exercised in a just and equitable manner . . . ." However, we have held that a classification does not violate

this provision if it is founded upon a reasonable distinction and bears a substantial relation to the object of the legislation. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974). It is only those classifications which are arbitrary or capricious which violate Article V, section 2. Id.

We have already concluded that the classification here is not arbitrary or capricious, but is based upon a reasonable distinction substantially related to the subject of the legislation. The classification, therefore, does not violate Article V, section 2 of the North Carolina Constitution.

The decision of the Court of Appeals is MODIFIED and AFFIRMED.

APPENDIX B

NO. 8210SC1163

NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 1984

In the Matter of the
Assessment of Additional
North Carolina and Orange
County Use Taxes Against
VILLAGE PUBLISHING
CORPORATION for Period
from April 1, 1972 through
March 31, 1978

Wake County
No. 81CVS6572

Appeal by petitioner Village Publishing Corporation from Farmer, Judge. Judgment entered 19 July 1982 in Superior Court, Wake County. Heard in the Court of Appeals 27 September 1983.

Petitioner Village Publishing Corporation appeals from a judgment of the superior court affirming the decision of the Tax Review Board and the Secretary of Revenue sustaining the proposed assessment of additional state and county use taxes against it. Petitioner is the

publisher and distributor of a publication known as The Village Advocate (hereinafter "the Advocate").

During the period in question, the Advocate was printed by Womack Press in Virginia. Petitioner did not pay any North Carolina use tax with respect to the sums charged it by Womack Press for printing the Advocate. In June 1978 the North Carolina Department of Revenue issued notices of proposed assessment of additional state and county use taxes against petitioner together with penalties and interest based upon the sums paid by petitioner to Womack Press.

Petitioner protested the proposed assessment and requested a hearing before the Secretary of Revenue. At the hearing, petitioner contended that (1) the Advocate is a newspaper, and (2) since the purchases of newsprint, ink and printing services by paid circulation

newspapers are exempt from sales and use taxation by G.S. 105-164.13(28) and Sales and Use Tax Regulation 38, the denial of this exemption to the Advocate, a free circulation newspaper, is in violation of the principle of equitable taxation set forth in Article V, section 2 of the North Carolina Constitution; the guarantees of freedom of speech and of the press in the first amendment to the United States Constitution; and the guarantees of equal protection of the laws in the fourteenth amendment to the United States Constitution.

Twenty copies of the Advocate were introduced into evidence. These showed that the Advocate consists almost entirely of commercial and classified advertising but contains a limited number of news and sports articles and announcements of local interest such as movie schedules, school lunch menus, schedules of sporting

events, community events calendars, and a question and answer section on antiques. The evidence showed that the Advocate is distributed free of charge. The Secretary made findings of fact consistent with the evidence and concluded as a matter of law that the Advocate is not a newspaper but is an advertising circular; that even if the Advocate were classified as a newspaper it would still be subject to use taxation because G.S. 105-164.13(28) exempts only paid circulation newspapers and not free circulation newspapers; and that as Secretary of Revenue, he had no authority to rule on the constitutional questions presented.

Petitioner then filed a petition with the Tax Review Board requesting an administrative review of the decision of the Secretary of Revenue. Following a hearing, the Tax Review Board affirmed the decision of the Secretary of Revenue

and specifically approved and adopted by reference in its decision the findings of fact and conclusions of law made by the Secretary. In August 1981, petitioner paid the taxes and interest asserted to be due and filed a petition for judicial review in superior court seeking reversal of the Tax Review Board's decision on the grounds that (1) the Board's finding that the Advocate is not a "newspaper" for purposes of the N.C. Sales and Use Tax Act is not supported by substantial evidence in view of the entire record as submitted, and (2) the Board's decision is in violation of the constitutional provisions noted previously herein.

The superior court affirmed the decision of the Tax Review Board in all respects. From the judgment entered, petitioner appealed.

Thigpen and Hines, by James C. Smith, for petitioner appellant.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for respondent appellee North Carolina Department of Revenue.

WEBB, Judge.

The question posed by this appeal is whether the Advocate is a newspaper and thus exempt under G.S. 105-164.13(28) from the use tax imposed by G.S. 105-164.6 and G.S. 105-468. The evidence is not in dispute. The Advocate is devoted almost entirely to advertising with some announcements of special events. We hold it was not error for the Secretary of Revenue and the Tax Review Board to conclude that the Advocate is not a newspaper.

We have found no case in this State dealing with the point at issue in this case. We believe a newspaper is a publication appearing at short intervals of time containing news which may be of

various types, and intended for the general reader. See 58 Am. Jur. 2d Newspapers, Periodicals, etc. § 1 (1971); 66 C.J.S. Newspapers § 1 (1950). We believe news is ordinarily understood as being "reports of recent occurence and of a varied character, such as political, social, moral, religious, and other subjects of a similar nature, local or foreign, and intended for the information of the general reader." 58 Am. Jur. 2d, supra at p. 130. We believe that news reports are distinguishable from paid advertisements. The Tax Review Board found that the Advocate is devoted almost entirely to advertising. We believe this finding is supported by the evidence. Since the Advocate does not disseminate news except in very small amounts, we do not believe it qualifies as a newspaper but is instead an advertising circular.

Most of the cases from other jurisdictions which deal with the issue in this case decide the matter as we do. See Green v. Home News Publishing Co., 90 So. 2d 295 (Fla. 1956); Department of Revenue v. Skop, 383 So. 2d 678 (Fla. 1980); Shoppers Guide Publishing Co. v. Woods, 547 S.W. 2d 561 (Tenn. 1977); G & B Publishing Co., Inc. v. Department of Taxation and Finance, 57 A.D. 2d 18, 392 N.Y.S. 2d 938 (1977). A different result was reached in at least one state. See Hadwen, Inc. v. Department of Taxes, 139 Vt. 37, 422 A. 2d 255 (1980), appeal dismissed, sub nom. Hadwen, Inc. v. Vermont Department of Taxes, 451 U.S. 977, 101 S.Ct. 2300, 68 L.Ed. 2d 834 (1981). We believe we are in accord with the majority.

Our determination that the Tax Review Board was correct in holding the Advocate is not a newspaper renders moot

much of petitioner's constitutional arguments. We address its contention that the imposition of a use tax on the Advocate is an attempt to impose a tax on the transmission of an advertising message in violation of the first amendment to the United States Constitution. We do not believe this contention has merit. The tax imposed is not upon the dissemination of information to the public. It is a general tax which is applicable to all persons who use, consume, distribute or store for use or consumption tangible personal property in this state.

Affirmed.

Judges HEDRICK and HILL concur.

APPENDIX C

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
81 CVS 6572

In the Matter of the Assessment of Additional North Carolina and Orange County Use Taxes against VILLAGE PUBLISHING CORPORATION for the Period from April 1, 1972, through March 31, 1978	)	JUDGMENT

This cause regularly coming on to be heard before the undersigned Judge Presiding at the 21 June 1982 Civil Session of the Superior Court of Wake County, and the court having heard oral arguments of counsel representing Petitioner and Respondent, and having received and considered briefs filed with respect thereto; and having further fully reviewed, examined and considered the administrative decision of the Tax Review Board heretofore entered and the record

upon which said administrative decision rests; and the matter having been heard in compliance with the requirements of Article 4 of Chapter 150A of the General Statutes, the court finds:

The decision of the Tax Review Board herein reviewed is supported by competent, material and substantial evidence in view of the entire record as submitted, and the substantial rights of the Petitioner have not been prejudiced; said decision is not in violation of constitutional provisions or in excess of the statutory authority and jurisdiction of the Board; said decision was made pursuant to law and lawful procedure, is neither arbitrary nor capricious, is unaffected by any error of law, and upon the entire record herein judicially reviewed should be affirmed.

NOW THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED that the Decision of

the Tax Review Board shall be and the same is hereby affirmed in all respects. The Petitioner shall pay the costs to be taxed by the Clerk.

This the 19th day of July, 1982.

/s/ Robert L. Farmer
Robert L. Farmer
Judge Presiding

APPENDIX D

State of North Carolina

Before The

TAX REVIEW BOARD

In the Matter of the Petition of)
THE VILLAGE ADVOCATE for an Admin-)
istrative Review of the Decision)
of the Secretary of Revenue with)
Respect to Assessment of Sales and)
Use Tax.)

ADMINISTRATIVE DECISION NO. 181
Entered June 12, 1981

On February 9, 1981, THE VILLAGE ADVOCATE (hereinafter referred to as the petitioner) filed with the Tax Review Board (hereinafter referred to as the Board) its petition for review of the decision of the Secretary of Revenue entered on November 11, 1980, in which assessment of North Carolina sales and use tax was sustained.

On June 12, 1981, a meeting of the Board was held in the City of Raleigh with the following members present: Harlan E. Boyles, State Treasurer,

Chairman; Robert K. Koger, Chairman of the Utilities Commission; and T. N. Brafford. Also present were H. C. Stansbury and Billy J. Baucom, Secretary and Assistant Secretary, respectively, to the Board. The petitioner was represented by Richard E. Thigpen, Jr., Attorney. The Secretary of Revenue was represented by George W. Boylan, Assistant Attorney General, and Eric L. Gooch, Director, Sales and Use Tax Division, North Carolina Department of Revenue. At the meeting the petitioner and the respondent reviewed the facts and gave their respective arguments and contentions with respect to applicable law.

Following the hearing the Board gave full consideration to the petition, evidence of record, and arguments and contentions which the parties to the dispute made during the hearing. Thereafter, the Board rendered its decision.

STATEMENT OF THE CASE

The petitioner, THE VILLAGE ADVOCATE, is a division of the Village Publishing Corporation organized under the laws of the State of North Carolina with its principal place of business being in Chapel Hill, North Carolina. Petitioner is engaged in the business of disseminating a publication under the name of "The Village Advocate". The publication is distributed without charge to the public by house-to-house delivery or by racks located at various points within the service area and at several local merchants' establishments.

Employees of the petitioner prepare the layouts of the publication and furnish these layouts to an out-of-state printer who, for a fee, prints the publication. The Advocate's current circulation is approximately 24,000 with all except about three percent of the

copies being delivered house-to-house in the Chapel Hill/Carrboro area.

On May 8, 1978, the Department of Revenue completed an audit of petitioner's records for the period April 1, 1972, through March 31, 1978, and proposed an assessment of additional use tax, penalty, and interest with respect to its purchase of the printed materials in question. The basis of the use tax assessed was the amount of the fees paid by the petitioner to the out-of-state printer upon such purchases. Petitioner protested the assessment; and, following a hearing before the Secretary of Revenue, petitioned the Board for review of the Secretary's final decision sustaining the assessment.

Petitioner contends that the Advocate is a "newspaper" and that the out-of-state printer performs only the service of printing the materials which

the Advocate staff prepares and that fees charged for such services are not subject to the sales and use tax. Petitioner further contends that similar purchases by paid subscription newspapers and such newspapers' purchases of newsprint and ink are exempt from sales and use taxation by G.S. 105-164.13(28) and Sales and Use Tax Regulation 38, and that the denial to the Advocate of the exemption granted to paid circulation newspapers is in violation of the principle of equitable taxation of the North Carolina Constitution, the guarantees of freedom of speech and of the press of the First Amendment to the United States Constitution, and the guarantee of equal protection of the Fourteenth Amendment of the United States Constitution.

Respondent argues that the Advocate is not a newspaper under the statute nor in the usual or ordinarily accepted

meaning of the word "newspaper" and that petitioner does not publish and sell newspapers but purchases advertising circulars not for resale but which it distributes to recipients free of charge. Respondent further contends that the printed advertising circulars are tangible personal property as defined by G.S. 105-164.3(20), and do not constitute services rendered by the out-of-state printer, and consequently, such purchases are subject to the use tax levied under the provisions of G.S. 105-164.6 and G.S. 105-468.

QUESTIONS

1. Is the publication titled "The Village Advocate" a "newspaper" under the statute, or in the usual or ordinarily accepted meaning of the word?

2. Did petitioner purchase services, or did it purchase tangible personal property from the out-of-state printer?

3. Is the decision of the Secretary of Revenue which sustained the assessment against the petitioner correct in law and supported by the record?

FINDINGS OF FACT

The facts found by the Secretary of Revenue as set forth in his decision of November 11, 1980, are supported by adequate, competent evidence within the record compiled below, and are hereby adopted by reference as the findings of fact of the Board.

CONCLUSIONS OF LAW

The conclusions of law reached by the Secretary of Revenue are correct and are hereby adopted by reference as conclusions of law of the Board.

DECISION

It is the opinion of the Board that the publication titled "The Village Advocate" is not a "newspaper" under the statute, nor in the usual or ordinarily

accepted meaning of the word "newspaper". It is further the opinion of the Board that the fees paid by petitioner to the out-of-state printer and which were included in the audit as shown in the record before the Secretary of Revenue did in fact represent purchases of tangible personal property, not purchased for resale, and therefore, such purchases were subject to the use tax under the provisions of G.S. 105-164.6 and G.S. 105-468.

With respect to the petitioner's constitutional concerns, the Board lacks the authority to deal with them. Insurance Co. v. Gold (1961) 254 N.C. 168.

It is the opinion of the Tax Review Board that the decision of the Secretary of Revenue is without error, and, therefore, it is HEREBY ORDERED:

1. That the decision of the Secretary of Revenue be affirmed; and

2. That no cost of this proceeding shall be added to or made a part of any tax liability to be collected by the Secretary of Revenue.

Entered in the City of Raleigh on the 12th day of June, 1981.

TAX REVIEW BOARD

/s/ Harlan E. Boyles
Harlan E. Boyles, Chairman
State Treasurer

/s/ Robert K. Koger
Robert K. Koger, Chairman
of the Utilities
Commission

/s/ T. N. Brafford
T. N. Brafford

APPENDIX E

File No. 901-2-68-6307

TAX HEARING

N.C. DEPARTMENT OF REVENUE

DATE: June 19, 1980 HOUR: 2:30 p.m.

NAME OF TAXPAYER: Village Advocate, Village Publishing Corporation

ADDRESS: Post Office Box 2145, Chapel Hill, North Carolina

PRESENT

DEPARTMENT REPRESENTATIVES: Mark G. Lynch, Secretary of Revenue, Eric L. Gooch, Director, Sales and Use Tax Division, George W. Boylan, Assistant Attorney General

TAXPAYER'S REPRESENTATIVES:

NAME	ADDRESS
Mr. Richard E. Thigpen, Jr., Attorney at Law	Charlotte, NC
Mr. Heath Alexander, Attorney	Charlotte, NC

TAX SCHEDULE: E

DATE OF ASSESSMENT: June 12, 1978

PERIOD COVERED: April 1, 1972 - March 31, 1978

	TAX	PENALTY
State	$22,297.43	$5,330.25
County	7,432.48	1,776.75
Total	$29,729.91	$7,107.00

	INTEREST	TOTAL
State	$4,104.75	$31,732.43
County	1,368.23	10,577.46
Total	$5,472.98	$42,309.89

This matter was heard before the Secretary of Revenue, in the City of Raleigh, upon application for hearing filed by the taxpayer.

The above-named taxpayer is engaged in the business of disseminating a publication under the name of The Village Advocate. The publication contains both commercial and classified advertising and is distributed without charge to the public by house-to-house delivery or by racks located at various points within the service area and at several local

merchants' establishments. On May 8, 1978, Auditor C. T. Grady completed an examination of the taxpayer's records for the period April 1, 1972 through March 31, 1978, and proposed an assessment of additional use tax, penalty and interest in the amounts shown in the heading of this form. The audit report shows that the additional use tax proposed to be assessed resulted from the taxpayer's failure to remit the State and local use tax to this Department on purchases of the printed advertising circulars from out-of-state vendors for use in this State.

Pursuant to the provisions of G.S. 105-241.1, our notice of proposed assessment was issued and mailed to the taxpayer on June 12, 1978; and the taxpayer protested the assessment on July 6, 1978.

ISSUES

The issues to be decided in this matter are as follows:

(1) Is The Village Advocate a newspaper in the generally accepted definition of the word newspaper?

(2) Does payment for the printed matter which is the subject of this hearing represent the purchase of a service from the printer and, thus, exempt from sales and use tax, or does it represent the purchase of tangible personal property which comes within the purview of the taxing statute?

(3) Does the imposition of a sales or use tax on the subject printed matter violate the taxpayer's constitutional rights?

APPLICABLE LAW AND LEGAL AUTHORITY

North Carolina General Statute 105-164.4 which provides, in part, as follows:

> "Imposition of tax; retailer. -- There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail, . . . in this State, the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:
>
> "(1) At the rate of three percent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State, . . ."

North Carolina General Statute 105-164.6 which provides, in part, as follows:

> "Imposition of tax. -- An excise tax is hereby levied and imposed on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State, the same to be collected and the amount to be determined by the application of the following rates against the sales price, to wit:
>
> "(1) At the rate of three percent (3%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed, distributed or stored for use or consumption in this State; . . .

"(5) Every person storing, using or otherwise consuming in this State tangible personal property purchased or received at retail either within or without this State shall be liable for the tax imposed by this Article and the liability shall not be extinguished until the tax has been paid to this State. . . ."

North Carolina General Statute 105-467 which provides, in part, as follows:

"Sales tax imposed; limited to items on which the State now imposes a three percent sales tax. -- The sales tax which may be imposed under this Article is limited to a tax at the rate of one percent (1%) of:

"(1) The sales price of those articles of tangible personal property now subject to the three percent (3%) sales tax

imposed by the State under G.S. 105-164.4(1); . . ."

North Carolina General Statute 105-468 which provides, in part, as follows:

"Use tax imposed; limited to items upon which the State now imposes a three percent use tax. -- The use tax which may be imposed under this Article shall be at the rate of one percent (1%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed or stored for use or consumption in the taxing county, except that no tax shall be imposed upon such tangible personal property when, if the property were subject to the use tax imposed by G.S. 105-164.6, such property would be taxed by the State of North Carolina at a rate less than three percent (3%).

"Every retailer engaged in business in this State and in the taxing county and required to collect the use tax levied by G.S. 105-164.6 shall also collect the one percent (1%) use tax when such property is to be used, consumed or stored in the taxing county, said one percent (1%) use tax to be collected concurrently with the State's use tax; but no retailer not required to collect the use tax levied by G.S. 105-164.6 shall be required to collect the one percent (1%) use tax. The use tax contemplated by this section shall be levied against the purchaser, and his liability for such tax shall be extinguished only upon his payment of the use tax to the retailer, where the retailer is required to collect the tax, or to the Secretary of Revenue, or to the taxing county

as appropriate, where the retailer is not required to collect the tax."

North Carolina General Statute 105-474 which provides, in part, as follows:

"Definitions; construction of Article; remedies and penalties. -- The definitions set forth in G.S. 105-164.3 shall apply to this Article insofar as such definitions are not inconsistent with the provisions of this Article, and all other provisions of Article 5 and of Article 9 of Subchapter 1, Chapter 105 of the General Statutes, as the same relate to the North Carolina Sales and Use Tax Act shall be applicable to this Article unless such provisions are inconsistent with the provisions of this Article. The administrative interpretations made by the Secretary of Revenue with respect to the North Carolina

Sales and Use Tax Act, to the extent not inconsistent with the provisions of this Article, may be uniformly applied in the construction and interpretation of this Article. It is the intention of this Article that the provisions of this Article and the provisions of the North Carolina Sales and Use Tax Act, insofar as practicable, shall be harmonized."

North Carolina General Statute 105-164.3(4) which provides as follows:

"'Cost price' means the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, cash discounts, labor or service costs, transportation charges or any expenses."

North Carolina General Statute 105-164.3(16) which provides, in part, as follows:

"'Sales price' means the total amount for which tangible personal property is sold including charges for any services that go into the fabrication, manufacture or delivery of such tangible personal property and that are a part of the sale valued in money whether paid in money or otherwise and includes any amount for which credit is given to the purchaser by the seller without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest charged, losses or any other expenses whatsoever. . . . "

North Carolina General Statute 105-164.3(20) which provides as follows:

"'Tangible personal property' means and includes personal property which may be seen, weighed, measured, felt

or touched or is in any other manner perceptible to the senses. The term 'tangible personal property' shall not include stocks, bonds, notes, insurance or other obligations or securities, nor shall it include electricity, gas or water delivered by or through main lines or pipes either for commercial or domestic use or consumption."

Paragraph two of Sales and Use Tax Regulation 3(b) which provides as follows:

"Purchases by advertising agencies of paper, ink, printing plates, finished art, positives, negatives, filmed or recorded commercials, brochures, programs, and all other tangible personal property used in providing such advertising are subject to sales or use tax. When advertising agencies make such

purchases from suppliers in North Carolina or from out-of-state suppliers who charge the applicable tax, they should pay the tax due thereon directly to their suppliers. When advertising agencies make purchases of tangible personal property from out-of-state suppliers who do not collect and remit the North Carolina State or local sales or use tax due thereon, the advertising agencies become liable for remitting the tax due thereon directly to the Department on the actual cost price of such tangible personal property without any deduction therefrom on account of the cost of the materials used, cash discounts, labor or service costs, transportation charges or any expenses whatsoever."

North Carolina Sales and Use Tax Regulation 38 which provides, in part, as follows:

> "(a) All retail sales of tangible personal property by commercial printers or publishers are subject to the 3% rate of sales or use tax unless such sales are exempt by Statute or subject to a lesser rate of tax under the provisions of G.S. 105-164.4(1).
>
> "(b) Retail sales of advertising circulars, catalogues, booklets, pamphlets, forms, tickets, letterheads, envelopes and similar items and retail sales of books, magazines, periodicals, newspapers and other publications are subject to the 3% rate of tax. When publications are sold by subscription, the tax accrues at the time the subscription is accepted."

North Carolina General Statute 105-164.13 which provides, in part, as follows:

> "The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article:
>
> "(28) Sales of newspapers by resident newspaper street vendors and by newsboys making house-to-house deliveries and sales of magazines by resident magazine vendors making house-to-house sales."

EVIDENCE

The evidence presented at the hearing before the Secretary of Revenue consisted of the following:

(1) The examining auditor's report reflecting the basis for the proposed assessment. Attached is a copy of the face sheet of

the audit report showing the computation of additional tax, penalty and interest due which is marked Exhibit (1).

(2) The attached copies of notices of proposed assessment issued on June 12, 1978, which are marked Exhibit (2).

(3) The attached copies of the taxpayer's letter of protest dated June 6, 1978, and the reply of the Director of the Sales and Use Tax Division dated July 13, 1978, which are marked Exhibit (3).

(4) The attached copy of a letter from the taxpayer's attorney, Mr. Richard E. Thigpen, Jr., dated August 11, 1978, setting forth in detail the taxpayer's objections to the proposed

assessment which is marked Exhibit (4).

(5) The attached copy of Regulation 17 NCAC 7B .0901; ADVERTISING AND ADVERTISING AGENCIES; which is marked Exhibit (5).

(6) The attached Brief For Tax Hearing setting forth the Department's position in this matter which is marked Exhibit (6).

(7) The attached copy of a letter from the taxpayer's attorney dated July 11, 1980, with copies of the taxpayer's Brief and the results of two circulation surveys conducted by the taxpayer as requested by the Secretary of Revenue during the hearing which are marked Exhibit (7).

(8) Twenty copies of The Village Advocate which are marked Exhibits (8A) through (8T) and are maintained in the taxpayer's file in the Sales and Use Tax Division. These Exhibits are made a part of this decision by reference.

FINDINGS OF FACT

Based upon the foregoing evidence, the Secretary of Revenue finds the following facts:

(1) The taxpayer is the publisher and distributor of a publication known as The Village Advocate which is distributed without charge to persons residing in the Chapel Hill-Carrboro area through racks located in the service area and by house-to-house deliveries. The publication does not

contain the general news of the day but is devoted almost entirely to commercial and classified advertising. In addition, the publication contains a limited number of announcements of special events such as schedules of movies, schedules of sporting events, school lunch menus, community events calendars, a question and answer section on antiques, and other special interest matter. The taxpayer's revenue is derived entirely from charges for advertising space in the publication.

(2) In connection with this business, the taxpayer prepares the layout for the publication and furnishes same to an out-of-state printer who prints the

publication and sells same to the taxpayer for use in this State in connection with its business. The taxpayer does not purchase the publication for resale.

(3) The out-of-state vendor of the publication is not engaged in business in this State and, thus, is not liable for collecting the State and local use tax. The taxpayer did not remit the State and local use tax directly to this Department on such purchases.

(4) On May 8, 1978, Auditor Grady completed an examination of the taxpayer's records for the period April 1, 1972 through March 31, 1978, and proposed an assessment of additional tax, penalty and interest on such

purchases in the total amount of $42,309.89.

(5) The taxpayer timely objected to the proposed assessment.

(6) The taxpayer did not object to the amount of additional tax proposed to be assessed, and it is presumed to be mathematically correct.

CONCLUSIONS OF LAW

(1) The publication purchased by the taxpayer may be seen, weighed, measured, felt or touched and is perceptible to the senses. Therefore, it is tangible personal property as defined by G.S. 105-164.3(20).

(2) The publication is not a newspaper under the statute nor in the usual or ordinarily accepted meaning of the word "newspaper." The taxpayer does

not publish and sell newspapers but purchases advertising circulars for free distribution. The principal purpose of the publication is the advertising of merchandise and services offered by business concerns in the Chapel Hill-Carrboro area and not the dissemination of news. The publication constitutes an advertising circular and not a newspaper even though a modicum of local announcements and other material found in newspapers is included therein.

(3) The statute does not contain any authority to exempt from the sales or use tax the payment made by the taxpayer to the printer for the printed material which is the subject

of this hearing. The printed advertising circulars are not evidence of services rendered. The primary object and concern of the taxpayer was to acquire finished advertising circulars for use in advertising merchandise and services offered by the business concerns in its service area. The charge by the printer for printing and delivering several thousand advertising circulars cannot be equated with a charge made by an attorney for legal services, by an auditor for auditing records or preparing a balance sheet, or by a physician for a medical examination because as to the latter, receipt of a service, not property, is the essential essence of the

transaction. The true object purchased by the taxpayer is not service per se, but rather the finished circulars produced by the printer.

(4) The printed matter was purchased from an out-of-state printer for use in this State by the taxpayer to advertise the businesses of its customers in its service area. Such purchases are subject to the use tax levied by the provisions of G.S. 105-164.6 and G.S. 105-468. The taxpayer's liability for such tax is not extinguished until the tax is paid to the State.

(5) Under the provisions of Sales and Use Tax Regulation 3, the taxpayer is liable for remitting the applicable tax on

printed materials and other tangible personal property purchased for use in providing advertising for its customers.

(6) Under the provisions of Sales and Use Tax Regulation 38, retail sales of printed materials by commercial printers or publishers are subject to the applicable sales or use tax unless such sales are exempt by statute.

DECISION

In evaluating the evidence of record in this matter as it relates to the taxpayer's contention that its purchased of printed advertising materials for use in advertising the merchandise and services offered by business concerns in its service area are exempt from tax as newspapers, it is the Secretary's opinion that the evidence and the statute do not

support the taxpayer's contention. The publication is not devoted to the general news of the day, that is, reports of happenings of recent occurrence and of a varied character, such as political, social, moral, religious, and other subjects of a similar nature, local or foreign, and intended for the information of the general reader, but is devoted almost entirely to commercial and classified advertising. It cannot be classified as a newspaper under the statute nor in the usual or ordinarily accepted meaning of the word. The statute does not contain any authority for an exemption from tax for purchases of advertising circulars or, as a matter of fact, newspaper which are not to be sold but are to be given free to persons in the taxpayer's service area.

With regard to the taxpayer's contention that its payments to the

printer for the printed materials which are the subject of this hearing represent payments for services rendered by the printer which are exempt from sales and use taxes, it is the Secretary's opinion that the primary object and concern of the taxpayer was to acquire advertising circulars for use in advertising the merchandise and services offered by business concerns in the Chapel Hill-Carrboro area and was not to acquire an intangible service per se. The publication is tangible personal property as defined by G.S. 105-164.3(20), and the taxpayer's purchases of same for use or consumption in this State are subject to sales or use tax.

The Secretary has considered the taxpayer's contention that the imposition of a sales or use tax on its purchases of printed matter which is the subject of this hearing violates the taxpayer's

constitutional rights. Such questions are a matter for the Courts to decide as the Secretary of Revenue is precluded from ruling on constitutional questions.

NOW, THEREFORE, it is directed that the proposed assessment of additional use tax of $29,729.91 be, and same is sustained with interest to be computed thereon in accordance with the statute. Since the facts do not clearly indicate that the taxpayer exercised bad faith in disregarding the Sales and Use Tax Law, it is directed that the statutory penalty be waived.

This 11th day of November, 1980.

/s/ Mark G. Lynch
Mark G. Lynch,
Secretary of Revenue

APPENDIX F

FILED
Jan 29 11:45 '85
IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

IN THE SUPREME COURT OF NORTH CAROLINA

In the Matter of the Assessment of Additional North Carolina and Orange County Use Taxes Against VILLAGE PUBLISHING CORPORATION for the Period from April 1, 1972 through March 31, 1978	No. 127PA84 NOTICE OF APPEAL

Notice is hereby given that VILLAGE PUBLISHING CORPORATION, having its principal place of business in Chapel Hill, North Carolina, appeals to the United States Supreme Court from the decision and judgment of the Supreme Court of North Carolina, entered in the within cause on November 6, 1984. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

This the 28th day of January, 1985.

MOORE, VAN ALLEN, ALLEN & THIGPEN
3000 NCNB Plaza
Charlotte, North Carolina 28280
Telephone: (704) 374-1300
Attorneys for Village Publishing
Corporation

By: /s/ James C. Smith
James C. Smith

AFFIDAVIT OF SERVICE

I hereby certify that I made service of the foregoing Notice of Appeal by depositing three copies of said Notice, in a United States post office or mail-box, with first-class postage prepaid, addressed to counsel of record at the following address:

George W. Boylan
Assistant Attorney General
North Carolina Department of Revenue
Room 372, Revenue Building
Raleigh, North Carolina 27640

This the 28th day of January, 1985.

MOORE, VAN ALLEN, ALLEN & THIGPEN
3000 NCNB Plaza
Charlotte, North Carolina 28280
Telephone: (704) 374-1300

By: /s/ James C. Smith
James C. Smith

Subscribed and sworn to
before me the ____ day of January, 1985

_____
Notary Public

My Commission Expires: _____

FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, hereby certify that on this 1st day of February, 1985, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Jurisdictional Statement and further certify that I mailed this same date the required three copies to the opposing counsel listed below:

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Office - Supreme Court, U.S.
FILED
APR 23 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1248

In The
Supreme Court of the United States
October Term, 1984

—o—

VILLAGE PUBLISHING CORPORATION,
Appellant,

vs.

NORTH CAROLINA DEPARTMENT OF REVENUE,
Appellee.

—o—

On Appeal From The
Supreme Court of North Carolina

—o—

MOTION TO DISMISS APPEAL

—o—

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QUESTIONS PRESENTED

I. DOES IMPOSITION OF THE NORTH CAROLINA SALES AND USE TAX ACT UPON *THE VILLAGE ADVOCATE* VIOLATE ANY GUARANTEES OF FREEDOM OF SPEECH AND PRESS IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. DOES APPLICATION OF THE NORTH CAROLINA SALES AND USE TAX ACT TO *THE VILLAGE ADVOCATE* VIOLATE THE FOURTEENTH AMENDMENT GUARANTEE OF EQUAL PROTECTION OF THE LAW?

PARTIES

In the North Carolina Supreme Court, the parties were: Village Publishing Corporation, Appellant, and the North Carolina Department of Revenue, Appellee.

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No. 84-1248

In The

Supreme Court of the United States

October Term, 1984

VILLAGE PUBLISHING CORPORATION,
Appellant,

vs.

NORTH CAROLINA DEPARTMENT OF REVENUE,
Appellee.

On Appeal From The
Supreme Court of North Carolina

MOTION TO DISMISS APPEAL

Pursuant to the authority of Rule 16 and in the manner provided by Rules 33 and 42 of the Rules of the Supreme Court, the North Carolina Department of Revenue moves to dismiss the appeal of Village Publishing Corporation on the basis of the facts and authorities hereinafter set forth for the court's consideration.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 312 N.C. 211 (1984).

———o———

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(2).

———o———

STATEMENT OF THE CASE

Appellant, Village Publishing Corporation, publishes in North Carolina *The Village Advocate* (hereinafter "The Advocate"), a weekly "shoppers guide" publication consisting primarily of commercial and classified advertisements, but also containing a limited number of other items, including school lunch menus, sporting events schedules, and announcements of local public interest, which it distributes free of charge to individuals residing in Chapel Hill and Carrboro, North Carolina. The Advocate was actually printed in Virginia and sold to appellant by Womack Press, a Virginia corporation. Pursuant to The North Carolina Sales and Use Tax Act, specifically N.C. Gen. Stat. §§ 105-164.4 and 105-164.6, such sales to appellant were subject to "use" taxation, absent any applicable statutory exemption, and consequently, on or about June 12, 1978, appellee issued proposed use tax assessments against the appellant in respect to its purchases from Womack Press of such printed materials.

Through various administrative proceedings and before the trial court and intermediate appellate court, the appellant has protested the imposition of use tax liability, contending that The Advocate constitutes a "newspaper," and should be allowed to qualify for the statutory sales and use tax exemption afforded by N.C. Gen. Stat. § 105-164.13(28), providing in pertinent part for an exemption for *sales* of newspapers "by newspaper carriers making door to door deliveries." The Advocate is not "sold," but is instead distributed without charge. Upon further appeal, the North Carolina Supreme Court found "it unnecessary to address this issue" (whether The Advocate constituted a "newspaper" within the meaning of the statutory exemption), "assumed" that it did so qualify, but proceeded to sustain the assessment of taxes against appellant's First Amendment and Equal Protection challenges. From the opinion of the Supreme Court of North Carolina entered November 6, 1984, appellant's Notice of Appeal was filed January 29, 1985.

———o———

REASONS WHY THE APPEAL SHOULD BE DISMISSED

I. The Decision Of The North Carolina Supreme Court Is Fully Consistent With The First Amendment.

As does a majority of the other States, North Carolina complements its sales tax with a use tax in order to prevent avoidance of the sales tax by individuals purchasing personal property outside North Carolina for storage, use or consumption in the State. North Carolina's sales tax

and use tax "taken and applied together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased." *Johnston v. Gill,* 224 N.C. 638, 644, 32 S.E.2d 30, 33 (1944). The constitutionality of the use tax per se is no longer an open question. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1936); *Nelson v. Sears, Roebuck Co.,* 312 U.S. 359 (1940). Nevertheless, appellant alleges that imposition of North Carolina's use tax to it abridges its freedom of speech and asserts that "this case is similar to the case of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983) . . . ." (Jurisdictional Statement, p. 18).

But the facts at bar are in stark contrast to those construed by this court in *Minneapolis Star.* There, Minnesota had promulgated a sales and use tax exemption for periodic publications. Then, through a series of legislative amendments, the general taxation scheme was amended so that retail *sales* of such publications remained exempt, but there was levied a special *use* tax on the cost of "paper and ink" consumed in the production of a publication, but this extraordinary tax was itself further narrowed in scope by the promulgation of an exemption for the first $100,000 in cost of such ink and paper.

This court held such a taxation scheme unconstitutional, finding that Minnesota had "created a special tax that applies only to certain publications protected by the First Amendment." *Minneapolis Star* at 581. As a result of a series of amendments to Minnesota's complementary sales and use tax scheme, "ink and paper" had become

the only items subject to the State's use tax where the retail sale of their manufactured product was exempt. *Minneapolis Star* at 578. Minnesota had chosen not to apply its general sales and use tax to newspapers. "By creating this special use tax, which to our knowledge, is without parallel in the State's tax scheme (later characterized as Minnesota's 'ink and paper tax'), Minnesota has singled out the press for special treatment," *Minneapolis Star* at 582.

Unlike Minnesota, North Carolina does not have a specific ink and paper tax, but instead has enacted a general system of uniform taxation upon the sale or use of all tangible personal property within its taxing jurisdiction. *Johnston v. Gill, supra,* at 638. In contrast to the Minnesota statute, the North Carolina act is not targeted at "the press," or upon the privilege of disseminating information to the public. Rather, the North Carolina levy is merely a general tax, applying to all persons, whatever their business, who sell or use tangible personal property, and constitutes precisely the type of generally applicable "economic regulation" which has been consistently upheld by this court. As was held in *Minneapolis Star* at 583: "It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." Having failed to show that North Carolina in its general system of complementary sales and use taxation somehow singles out the press for disparate taxation, appellant has failed to manifest a constitutional question before this Court, and its appeal should be dismissed.

II. The Decision Of The North Carolina Supreme Court Does Not Deny Appellant Equal Protection.

N.C. Gen. Stat. § 105-164.13(28) in pertinent part provides an exemption from the State's uniform sales and use tax levy for "sales of newspapers by resident newspaper street vendors and by newspaper carriers making house-to-house deliveries. . . ." In its allegations before this court contending constitutional denial of equal protection because the manner in which it has elected to conduct business does not fall within the ambit of the statutory exemption, appellant sets up certain straw men in inadequately attempting to define the issues before the court in terms of the scope of the statute. As held by the court below, the exemption does not solely classify newspapers according to whether they are paid circulation or free circulation, but classifies also upon "the basis of the method of distribution." *In re Assessment of Taxes Against Village Publishing Corp.*, 312 N.C. 211, 220 (1984). The highest state court's construction of a state statute is binding upon the United States Supreme Court, *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972), and it is not the function of the Supreme Court to construe a state statute contrary to the construction given it by the highest court of a state. *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 837 (1978).

Therefore, the legislative distinction under review does not attempt to classify per se between "free circulation newspapers" and "traditional paid circulation newspapers," as implied by appellant. (Jurisdictional Statement, p. 20). Thus all newspapers actually sold by their publisher, or sold by or at retail establishments, or sold in-

trastate through the mail, are taxed similar to the appellant. If a publisher of "sold" newspapers also distributes a free newspaper which it purchases from another, it is taxed as has been the appellant; if such a publisher itself prints a free circulation newspaper, it would pay a tax upon the cost of the component parts, the ink and paper, used therein. N.C. Gen. Stat. § 105-164.6.

Nor as may be inferred from the appellant's broadside contentions does the availability of the exemption depend upon the publication's particular "content," "commercial" as in the case of The Advocate or otherwise. (Jurisdictional Statement p. 19). Whatever may be the content of appellant, the court below found same to be within the scope of the exemption, holding: "We assume, arguendo, that the *Advocate* is a newspaper within the meaning of the exemption as argued by appellant." *Village Publishing Corp., supra*, at 216.

Equally, inapplicable is appellant's reminder to this court that "any tax which burdens only a small group of newspapers is suspicious." (Jurisdictional Statement, p. 24), citations omitted. The exemption in question is in no respect dependent upon volume of circulation or upon any criterion of size. Nothing in the record compiled in the proceedings below suggests that appellant is among a majority, or a minority, in failing to qualify for the preferential tax treatment sought.

Instead, North Carolina's complementary sales and use taxation scheme classifies "on the basis of the method of distribution," *Village Publishing Corporation, supra*, at 220, which upon the record herein is "rationally related to furthering a legitimate state interest." *Massachusetts*

Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976). "In taxation, even more than in other fields, legislatures possess the greatest freedom in classification," *Madden v. Kentucky,* 309 U.S. 83, 88 (1940), and tax classifications need merely "rest upon some reasonable consideration of difference or policy." *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 527 (1959). Since the appellee has shown in its discussion under Part I herein that the statute is general and uniform in its application and does not burden a suspect group or a fundamental interest, no heightened judicial scrutiny is necessary, and the statute in order to withstand constitutional challenge need possess only a rational basis to its classification. *Vance v. Bradley,* 440 U.S. 93, 97 (1979). "In the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *New Orleans v. Dukes,* 427 U.S. 297, 303-304 (1976).

The rationality and reasonable economic interest served by the enactment of a limited exemption for sales of newspapers by newspaper carriers making door-to-door deliveries is found in the reasonable likelihood that such sales will be made by minors acting as independent agents from whom strict compliance with formal, monthly reporting requirements may be prohibitively costly for the Department of Revenue to police or administer, and for whom technical compliance by virtue of age or business experience may be unduly burdensome, or in part, impossible. Appellant improperly chides the decision below for "speculating" as to reasons underlying the statutory classification. (Jurisdictional Statement, pp. 28 and 29). "The State is not compelled to verify logical assumptions with

statistical evidence," *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 812 (1976), and "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." *Vance v. Bradley, supra,* at 111. Giving judicial deference which decisions of this court require to the reasonable economic classification made by the North Carolina Legislature, appellant has failed to establish a denial of equal protection.

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CONCLUSION

Based upon the foregoing argument and authorities, the North Carolina Department of Revenue respectfully submits that the appellant's appeal should be dismissed as it does not present for review any substantial federal question.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

VILLAGE PUBLISHING CORPORATION *v.* NORTH CAROLINA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

No. 84–1248. Decided June 10, 1985

The appeal is dismissed for want of a substantial federal question.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

The North Carolina Sales and Use Tax Act, N. C. Gen. Stat. §§ 105–164.1 to 105–164.44B, exempts "[s]ales of newspapers by resident newspaper street vendors and by newsboys making house-to-house deliveries and sales of magazines by resident magazine vendors making house-to-house sales." § 105–164.13(28). The provision offers newspapers using this means of delivery a tax benefit denied other members of the press. A publisher distributing a newspaper free of charge must pay sales or use tax on personal property that it purchases and incorporates into its newspaper (or on purchases of the printed newspaper itself if it is purchased in completed form from the printer), for such property is "not sold but used, consumed, distributed, or stored for consumption" in North Carolina. § 105.164.6(4). A publisher selling a newspaper at retail other than through street vendors or paperboys escapes sales or use taxation on personal property that goes into the production of the newspaper, for that property is resold, see § 105–164.13(8); however, sales tax must be paid on the final retail sale of such a newspaper. A newspaper that is sold through street vendors or newsboys escapes both forms of taxation: the publisher's purchase of personal property that goes into its final product is exempt, as such property is resold, and its retail sales are also exempt under § 105–164.13(28).

In this case, the Supreme Court of North Carolina held that this tax scheme, as applied to newspapers ineligible for the exemption, neither abridged the freedom of the press nor violated the Equal Protection Clause. The court pointed out that the North Carolina sales and use tax scheme did not single out the press for special treatment, but applied to retail sales generally. Thus, it was free from one of the primary defects of the tax struck down by this Court in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U. S. 575 (1983). That the statute contained an exemption for newspapers sold through street vendors and newsboys did not make it invalid: such an exemption required only a rational basis. The court found such a rational basis in the difficulty of requiring street vendors and newsboys—many of them children—to collect the sales tax. This difficulty, not present when a paper was sold through other means or given away free, justified the special exemption.

This case is within our mandatory appellate jurisdiction under 28 U. S. C. § 1257(2). Appellant argues that the North Carolina tax scheme, by singling out one segment of the press for a special exemption from taxation, violates the First Amendment and the Equal Protection Clause. In summarily dismissing the appeal, the Court today holds these arguments "insubstantial." In view of *Minneapolis Star*, *supra*, I cannot agree.

The statute at issue in *Minneapolis Star* not only singled out the press for special treatment, but also drew distinctions among members of the press, subjecting some to a tax while exempting others. The Court found both features objectionable. Concerning the second defect, we stated, "recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." 460 U. S., at 592. The Court went on to hold that "[a] tax that singles out

the press, *or that targets individual publications within the press*, places a heavy burden on the state to justify its action." *Id.*, at 592–593.

The North Carolina statute appears to discriminate among members of the press, selecting newspapers using one mode of delivery for a complete exemption from the sales/use tax while requiring all others to pay a tax on either their retail sales or the purchases of personal property that go into their publications. *Minneapolis Star* indicates that the State bears a heavy burden in justifying such a distinction. The North Carolina Supreme Court, however, applied mere rational basis scrutiny in upholding the statute. To me, even the suggestion that the statutory distinction is rational is debatable;* if, as *Minneapolis Star* suggests, the statute is subject to more stringent scrutiny, the question whether it can survive is far from insubstantial.

The Court's dismissal may reflect discomfort with *Minneapolis Star*'s broad holding that taxes drawing distinctions among members of the press are suspect even when they do not discriminate on the basis of content and are not apparently designed to suppress speech. If that is so, it seems to me that a more proper way of establishing the bounds of the principle asserted in *Minneapolis Star* is to give this case plenary consideration and openly decide the substantial questions it presents. I would note probable jurisdiction and set the case down for oral argument.

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*The difficulty in administering a sales tax that must be collected by children who serve as paperboys may well provide a rational basis for exempting the *retail sales* of newspapers sold through street vendors or newsboys from taxation. However, this rationale hardly seems to justify exempting such papers entirely from the sales/use tax scheme. Just as appellant and other free circulation newspapers are required to pay the sales or use tax on their purchases of personal property that form components of (or the entirety of) their final product, newspapers that are exempt from sales tax by virtue of their mode of distribution could easily be required to pay the use tax on their own purchases of the personal property that goes into their newspapers.